Office-Supreme Court, U.S.
FILED
29
OCT 1984
ALEXANDER L. STEVAS,
CLERK

84-691

No. 84- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

INTERNATIONAL ASSOCIATION OF NVOCCs and FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC. and TWIN EXPRESS, INC. and INTERNATIONAL CONTAINER EXPRESS, INC., *Petitioners,*

and

AMERICAN TRUCKING ASSOCIATIONS, INC.; TIDEWATER MOTOR TRUCK ASSOCIATION; HOUFF TRANSFER, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *Respondents,*

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RAYMOND P. DEMEMBER
Suite 400
3251 Old Lee Highway
Fairfax, Virginia 22030
(703) 691-0900

Counsel For Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED

1. Did the Court of Appeals properly disregard the restrictions imposed by maritime law in determining that the employers of longshoremen have a right to control the disputed work for the longshoremen's benefit?

PARTIES BELOW

The proceeding in the court whose judgment is sought to be reviewed involved four consolidated cases. The caption of this petition for certiorari reflects the parties in Case No. 83-1214.[1]

---

[1] Other parties in the other consolidated cases (Case Nos. 83-1185(L), 83-1424 and 83-1486) include: American Trucking Associations, Inc.; and Tidewater Motor Truck Association; American Warehousemens Association; International Brotherhood of Teamsters; International Longshoremen's Association, AFL-CIO; New York Shipping Association; Council of North Atlantic Shipping Associations; Chester, Blackburn & Roder, Inc.; Eagle, Inc.; Eller & Company, Inc.; Harrington & Company, Inc.; Strachen Shipping Company and Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; Marine Terminals, Inc.; Coordinated Caribbean Transport, Inc.; International Longshoremen's Association, Locals 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416-A, 1429, 1458, 1526, 1526-A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922 and 1970, AFL-CIO; International Longshoremen's Association, Atlantic Coast District Council, AFL-CIO; International Longshoremen's District Council, Baltimore, Maryland; International Longshoremen's Association, Hampton Roads District Council, AFL-CIO; Hampton Roads Shipping Association; and Southeast Florida Employers Port Association.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES BELOW	i
TABLE OF AUTHORITIES	iii
STATUTES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	4
REASON FOR GRANTING THE WRIT	13
The Decision of the Court of Appeals is Counter to the Mandate of This Court in *ILA* and Involves an Important Question of Federal Law Which Should Be Resolved by This Court	13

TABLE OF AUTHORITIES

Page

American Trucking v. *A.T.S.F.R.*, 387 U.S. 397 (1967). 21

Cancellation of Consolidation Allowance Rules, FMC Dkt. 76-35, 18 SRR 637 (1978) 23

Carpenters Union v. *Labor Board*, 357 U.S. 93 (1958) . 21

Consolidated Express Inc. v. *Sea-Land*, 16 SRR 817 (1976) .....

Galveston Truck Line Corp. v. *Ada Motor Lines*, 73 MCC 617 (1957) 21

Grace Line Inc. v. *FMB*, 280 F.2d 790 (2nd Cir. 1960) .20, 22

ICC v. *Delaware, L&WRR*, 220 U.S. 235 (1911) 20

ILA (Beck Arabia), 245 NLRB 171 (1979) 6, 7

ILA (Consolidated Express), 221 NLRB 956 (1975) .. 6

International Longshoremen's Ass'n (Dolphin Forwarding, Inc.), 266 NLRB 230 (1983) Dolphin II . 2

Isbrandtsen Co. Inc. et al. v. *States Marine*, 6 FMB 422 (1961), *affirmed sub nom States Marine Lines* v. *FMC*, 313 F.2d 906 (1963), cert. denied, 374 U.S. 831 (1963) 21

ILA (Dolphin Forwarding Co. Inc.), 236 NLRB 525 (1978) Dolphin I 4, 6, 7

ILA vs. *NLRB*, 537 F.2d 706 (2nd Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) 6, 7

ILA v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), 245 NLRB 171 (1979) 6

ILA (PRMM Inc.), 245 NLRB 171 (1979) 6, 7

Merchandise Warehouse Co. v. *ABC Freight*, 165 F. Supp. 67 (1958) 21

Montgomery Ward & Co. v. *Northern Pacific Term. Co.*, 128 F. Supp. 475 (1953) 21

TABLE OF AUTHORITIES continued

Page

NLRB v. *Enterprise Association of Pipefitters*, 429 U.S. 507 (1977) 13

National Woodwork Manufacturing v. *NLRB*, 386 U.S. 612 (1967) 7-8

Pascarell v. *New York Shipping Association Inc., et al.*, 650 F.2d 19 (1981) 9

Pick Up and Delivery Restrictions, Cal. Rail, 303 ICC 579 (1958) 21

Railway Employees v. *Florida E.C.R. Co.*, 384 U.S. 238 (1966) 21

Sea Land Service, Inc. Proposed Rules on Containers, 16 S.R.R. (P & F) 315, aff'd 18 S.R.R. (P & F) (FMC 1978), aff'd *sub nom Conasa* v. *FMC*, 672 F 2d 171 (D.C. Cir. 1982) *cert. denied* 103 S. Ct. 69 (Oct. 1982) Rept on Remand 21 SRR P & F) 853 (1982) Order on Rept on Remand 21 SRR (P & F) 1057 (1982) 17

South Atlantic and Caribbean Lines, Inc., 12 FMC 237, (1969) 17

Southern Steamship Co. v. *NLRB*, 316 U.S. 314 (1942) 24

Swayne & Hoyt, Ltd. v. *U.S.*, 300 U.S. 297 (1937) 20

Terminal Corporation, 250 NLRB 4 (1980) 6, 7

United Mineworkers v. *Pennington*, 381 U.S. 657 (1965) 19

U.S. v. *Sea-Land Service, Inc.*, 424 F.Supp. 1008, appeal dismissed, 577 F.2d 730 (3rd Cir. 1978), cert. denied, 439 U.S. 1072 (1979) .....

Volkswagenwerk v. *FMC*, 390 U.S. 261 (1968) 19, 22

Table of Authorities continued

Statutes:

	Page
28 U.S.C. § 1254(1)	2
National Labor Relations Act, 29 U.S.C. § 151 *et seq*, §§ 158(b), 158(b)(4)(B), 158(e)	2, 3, 14
46 U.S.C. §§ 817, 844	16
46 U.S.C. §§ 801 *et seq.*	3, 16
The Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984)	3

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84- ——

INTERNATIONAL ASSOCIATION OF NVOCCs and FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC. and TWIN EXPRESS, INC. and INTERNATIONAL CONTAINER EXPRESS, INC., *Petitioners,*

and

AMERICAN TRUCKING ASSOCIATIONS, INC.; TIDEWATER MOTOR TRUCK ASSOCIATION; HOUFF TRANSFER, INC.; AMERICAN WAREHOUSEMEN'S ASSOCIATION; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, *Respondents,*

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The International Association of NVOCCs, Florida Customs Brokers and Forwarders Association, Twin Express, Inc., and International Container Express, Inc. petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Opinion of the Court of Appeals, officially reported, 734 F. 2d 966 may be found in the Joint Appendix of Petitioners at Jt. App. 1A.[2] The Decision and Order of the National Labor Relations Board in *International Longshoremen's Ass'n. (Dolphin Forwarding, Inc.). (Dolphin II)* is reported at 266 NLRB 230 (1983) and may also be found in the Joint Appendix at 35A.

JURISDICTION

The Judgment of the Court of Appeals was entered on May 9, 1984. The Petition for Rehearing and Rehearing In Banc, filed by ATA and TMTA on May 23, 1984, was denied by the Court of Appeals on July 31, 1984. Jt. App. 31a. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (29 U.S.C. § 151 *et seq.*) (Act) are as follows:

Section 8(b), 29 U.S.C. § 158(b), provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—

---

[2] Cited hereinafter as "Jt. App. ——." Petitioners American Trucking Associations and Tidewater Motor Truck Association, International Ass'n. of NVOCCs, American Warehousemen's Ass'n., Houff Transfer, Inc. and International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America have joined in the preparation of the Joint Appendix.

> 4(ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where . . . an object thereof is:
>
> * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful . . . any primary strike, or primary picketing; . . .

Section 8(e), 29 U.S.C. § 158(e), provides in pertinent part:

> It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void . . .

The relevant portions of the maritime laws include the Shipping Act of 1984, Public Law No. 98-236, 98 Stat. 67 (March 20, 1984), the Maritime Labor Agreement Act of 1980, 46 U.S.C. § 801 *et seq.*, the Interstate Commerce Act, 49 U.S.C. § 2, and the Shipping Act, 1916, 46 U.S.C. §§ 812 and 814. These statutes may be found in the Joint Appendix at 259a.

STATEMENT OF THE CASE

This Petition seeks review of a decision by the United States Court of Appeals for the Fourth Circuit affirming in part and reversing in part a decision by the NLRB in Dolphin II, which arose out of a remand by this Court in 1980 of an earlier decision of the Board.[3] NLRB v. International Longshoremen's Association, 447 U.S. 490 (*ILA*).

The subject of this litigation is the legality of the Rules on Containers (Rules) negotiated by the International Longshoremen's Association (ILA) with the Council of North Atlantic Shipping Associations (CONASA) and the New York Shipping Association (NYSA) acting as agents on behalf of vessel operating common carriers and stevedoring companies which employ longshoremen. The central issue is whether the Rules advance lawful primary or unlawful secondary objectives within the meaning of §§ 8(b)(4)(B) and 8(e) of the Act. NLRB Administrative Law Judge Harmatz found the Rules valid under labor law, in part, as applied to less-than container load (LCL) cargo, but invalid, in part, as applied to certain full shipper loads (FSL) cargo. Judge Harmatz refused, despite this Court's clear mandate, to consider whether federal maritime law deprived the ocean carriers of the requisite control over the work claimed by the Rules.

The Board affirmed and adopted Judge Harmatz' decision with, in part, some different rationale but

---

[3] ILA (Dolphin Forwarding Co., Inc.), 236 NLRB 525 (1978) (Dolphin I).

fully adopted Judge Harmatz' refusal to consider whether federal maritime law deprived the employers of the right to control the disputed work.

The Court of Appeals also declined to consider the impact of maritime law on the validity or invalidity of the Rules stating simply that the right of control argument "lacks any semblance of merit" Jt. App. 25A. The Court emphasized the mere physical control of containers prior to their release to all shippers, ignoring all legal restraints concerning such release of containers. In its analysis of Judge Harmatz' rationalization the Court of Appeals repeated the simplistic assertions that the ocean carrier employers "own or lease the containers and can therefore prescribe the conditions under which they may be released" . . . thus concluding "that under such circumstances the 'right of control' resides with the shipping companies, the parties to the Rules". Jt. App. 20a.

A. Procedural History

The Rules on Containers have been the subject of continuous litigation for over a decade. There is no dispute that the Rules seek to obtain for ILA the work of stuffing and stripping containers that previously had been done by the non-ILA employees of consolidators and NVOCCs (non-vessel operating common carriers) who function within fifty miles of the seaports on the Atlantic and Gulf coasts. This objective is not seriously contested. Indeed, the Rules on Containers themselves explicitly require the steamship companies to deny containers to any consolidator or NVOCC who functions within this fifty-mile perimeter.

The consolidation and NVOCC industry continues to be viable only because various legal actions had prevented implementation of the Rules. In *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 NLRB 956 (1975) and in subsequent cases, the Board focused on the off-pier traditions of NVOCCs and consolidators. The Board concluded that the Rules were unlawful because the ILA had no off-pier work traditions. The United States Court of Appeals for the Second Circuit enforced the Board's order in *International Longshoremen's Association* v. *NLRB*, 537 F.2d 706 (1976), *cert. denied*, 429 U.S. 1041 (1977). In a number of subsequent cases, the Board followed this off pier/on pier locational approach and reached the same conclusion regarding the unlawfulness of the Rules on Containers.[4]

However, in *International Longshoremen's Association* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), the U.S. Court of Appeals for the District of Columbia disagreed with the Board's approach and concluded that emphasis must be placed on the work traditions of the ILA.

In light of the conflict in the circuits and the importance of the issue, this Court issued a writ of certiorari to the Court of Appeals for the District of Columbia Circuit. On June 20, 1980, this Court affirmed the decision of the Court of Appeals for the

---

[4] *See e.g.*, ILA (Dolphin Forwarding, Inc.), 236 NLRB 525 (1978); ILA (Puerto Rico Marine Management Inc.), 245 NLRB 171 (1979); ILA (Beck Arabia, Ltd.), 245 NLRB No. 172 (1979); ILA (Associated Transport, Inc.), 231 NLRB 351 (1977); ILA (Terminal Corporation), 250 NLRB No. 4 (1980).

District of Columbia Circuit. *NLRB* v. *International Longshoremen's Association,* (ILA) 447 U.S. 490. Pursuant to its decision, the Court vacated the Board's order in *Dolphin Forwarding, Inc.,* 236 NLRB 525 (1978) and in *Associated Transport, Inc.,* 231 NLRB 351 (1977) and remanded those cases to the Board for reconsideration. Following this Court's decision, the Court of Appeals for the Second Circuit recalled its mandate in *International Longshoremen's Association* v. *NLRB,* 537 F.2d 706 (1976) which had enforced the Board's order in *Consolidated Express* and *Twin Express* and had remanded those cases to the Board for reconsideration. The remand also included other cases involving the validity of the Rules.[5]

This Court did not reach any conclusion as to whether the Rules on Containers were lawful or unlawful. This Court's objection to the approach of the Board was quite specific; namely, the Board had inappropriately *focused* on the off-pier traditions. Such a focus was inconsistent with the need to consider "all the surrounding circumstances" under the test established in *National Woodwork Manufactur-*

---

[5] The Board's decisions in *International Longshoremen's Ass'n* (Puerto Rico Marine Management), Inc., 245 NLRB 171 (1979) and in *International Longshoremen's Ass'n, Local 1359* (Beck Arabia, Ltd.), 245 NLRB 172 (1979) were also remanded to the Board for reconsideration. These cases were then pending before the Courts of Appeals for the Fifth and Fourth Circuits, respectively. The Board also decided *sua sponte* to consider its decision in *Terminal Corporation,* 250 NLRB 4 (1980); *Hill Creek Farms, Inc.* and *Customs Brokers and Forwarders Association of Miami, Inc.,* as part of the same proceeding on remand.

ing v. *NLRB*, 386 U.S. 612 (1967). In remanding, this Court instructed the Board to undertake the complex task of assessing whether there exists a sufficient "historical and functional relationship" between work traditionally performed by longshoremen and the work sought by the Rules. Accordingly, the circumstances to be considered are the work traditions of longshoremen as well as the traditions of those affected by the boycott, the economic personality of the industry, and the nature and effect of the technological changes.

This Court also noted that, even if the Rules are deemed to be lawful "work preservation," the Board must further determine whether the steamship carriers have the power to implement the Rules. If not, the "right of control" test requires the conclusion that the Rules are secondary and unlawful.

Subsequent to the decision of this Court, ILA and various employer associations agreed to implement the Rules as of January 1, 1981. Beginning on that date, the steamship carriers refused to release containers for loading and unloading to NVOCCs, consolidators, motor carriers and warehousemen operating establishments within fifty miles of the port terminals. This action prompted the filing of unfair labor practice charges by the International Association of Non-vessel Operating Common Carriers, Twin Express, Inc. and the American Trucking Associations, Inc. ("ATA").

After concluding that there was reasonable cause to believe that the Rules continued to violate the Act, the General Counsel sought and obtained an injunction prohibiting enforcement of the Rules.

Pascarell v. *New York Shipping Association,* No. 81-13 (D.N.J. 1981).[6]

Pursuant to orders of the National Labor Relations Board issued in January and February of 1981, all of the old as well as the new cases involving the Rules on Containers were consolidated for expedited hearing for the purpose of receiving any further evidence in light of the remand by this Court.

B. Decision of the Administrative Law Judge

On September 29, 1981, Administrative Law Judge Joel A. Harmatz issued his decision which found that the Rules on Containers as applied to NVOCCs were lawful work preservation agreements. As to the specific issue of work preservation the Administrative Law Judge concluded that the consolidation and NVOCC industry was itself a primary beneficiary of the containerization technology and, apparently, for that reason was an appropriate subject for longshoremen's claims. The ALJ did not, however, confront fairly the issue of whether the historical and functional relationship between the work lost by longshoremen and the work claimed in this case is sufficient to conclude that the Rules on Containers are a lawful work preservation agreement.

---

[6] The United States Court of Appeals for the Third Circuit affirmed the issuance of the injunction by the District Court. *Pascarell* v. *New York Shipping Association, Inc., et al.,* 650 F.2d 19 (1981). This Court denied the petition of the ILA and NYSA for a writ of certiorari to the Court of Appeals for the Third Circuit on October 5, 1981.

Finally, the Administrative Law Judge concluded that it would be "mischievous" to apply the well-established right of control standard to this case. His reasoning for this conclusion was confusing and seems to be that, because the steamship carriers played such an important role in technological changes, the right of control should not be applied. The Administrative Law Judge offered no legal support whatsoever for this limitation on the right of control analysis.

C. Summary of Facts

With the history of longshoremen's work as a starting point, it is clear that the traditional work of longshoremen has been loading and unloading cargo on and off ships. Prior to containerization, longshoremen would accept break bulk cargo on behalf of the carrier and handle it in such a way as to effecuate its movement on and off the ship. These functions might well include unitizing the cargo on pallets so that the loading and unloading functions on behalf of the carriers could be more efficiently accomplished. However, it is also clear that if cargo came to the ports already unitized or otherwise placed in, by today's standards, small containers for the benefit of the shipper, longshoremen would accept the cargo in that form and would not rehandle and reunitize the cargo.

During this period consolidators performed their own functionally different services with employees not represented by ILA. Consolidators, actually, were not involved with the loading and unloading of cargo. Instead, they were concerned with specialized services provided to the shipping public. Their services in-

cluded preparing goods for delivery to the pier in a manner that most benefits the shipper. The services performed by consolidators were done for the convenience and benefit of the shippers and not the carriers. There may have been some similarity between unitizing cargo for purposes of loading and unloading ships and the work of consolidators preparing goods for shipment. Nevertheless, these functions, even before modern containerization, were historically and functionally quite different.

With the advent and growth of containerization, the respective basic roles and functions described above did not change. Surely, however, the nature of the work of loading and unloading ships changed quite dramatically. Instead of accepting and then unitizing break bulk cargo, longshoremen's primary task involved the loading and unloading of containers on and off ships. Until the events giving rise to this litigation, longshoremen did not attempt to rehandle containers delivered to the port. The stuffing and stripping of containers by longshoremen was basically limited to the deliveries by shippers who delivered their goods to the pier in some form other than in containers. Not until 1973, long after containers had become prevalent, did ILA make any real effort to obtain a substitute for its purported work lost because of efficiencies gained by containerization. Indeed, in a number of agreements longshoremen accepted the containerization technology with the soothing effects of considerable monetary payments by the steamship carriers which would, in turn, be paid for by the shipping public.

Containerization was but one aspect of substantial technological changes that provided a whole new

means of intermodal transportation. Consolidators and NVOCCs indeed have played and continue to play an important function in this entire new technology. The basic role of consolidators and NVOCCs remain the same—namely, providing an array of services for the shipping public to facilitate the entire transportation. These services and functions remain quite distinct historically and functionally from the services provided by longshoremen.

In 1973, long after the proliferation of containerization and related technology, ILA sought to acquire work as a substitute for the work it allegedly lost. A likely victim for this acquisitive intent was the NVOCC industry, generally dominated by small businesses. Yet, the history and functions of the NVOCC industry are quite distinct from those of the longshoremen work. There is not a sufficient connection to permit the ILA to claim and demand the NVOCC work.

Finally, the NVOCC industry has long been recognized by the Federal Maritime Commission as providing specialized services to the shipping public. The services and rates of NVOCCs are set forth in tariffs filed with the FMC. In addition, the NVOCC industry is protected by the shipping laws and cannot be discriminated against in providing its services to the shipping public. Indeed, under decisions of the Federal Maritime Commission, NVOCCs cannot be denied containers nor can they be the subject of discriminatory treatment. In short, the steamship companies do not have authority consistent with the shipping laws, to implement the Rules on Containers and discriminate against NVOCCs.

ARGUMENT

The Rules on Containers are Violations of the NLRA Because the Steamship Carriers Do Not Have the Power to Assign the Work Sought Under the Right of Control Test

Judge Harmatz refused to apply the right of control test as formulated and implemented by the Board and accepted by the Supreme Court in *NLRB* v. *Enterprise Association of Pipefitters,* 429 U.S. 507 (1977). The decision of Judge Harmatz does not dispute the thrust of the shipping laws. Indeed, he specifically refers to the decision of the Federal Maritime Commission which held that the Rules on Containers violate the Shipping Act. Despite these precedents, Judge Harmatz asserted that "to honor the FMC rulings would be mischievous in the present posture of the case." Jt. App. 168a. In support of this position, Judge Harmatz offers no cogent legal arguments. Instead, he points out the obvious that the policies underlying the shipping laws are distinct from the policies underlying labor laws.

Judge Harmatz' decision constitutes a veiled disapproval of the right of control test. The real logic underlying the decision is that because the steamship companies and other members of NYSA are in large part the progenitors of the containerization technology, the right of control test is not applicable here. Thus, Judge Harmatz uses his analysis with respect to the work preservation issue to circumvent the clear impact of the right of control test. To avoid the right of control test, the judge necessarily must conclude that the Shipping Act and administrative decisions thereunder are not to be considered and adhered to in assessing right of control.

The proper application of the right of control test in this case leads to the inescapable conclusion that the subject rules on containers violate 8(b)(4) and 8(e). Simply stated, the Rules on Containers require the carriers to discriminate against NVOCCs and consolidators. Indeed, the Rules call for a boycott under which NVOCCs and consolidators are denied containers—the very lifeblood of their operations. These aspects of the Rules on Containers are in direct contradiction to an important principle underlying the shipping laws, namely, non-discrimination among the shippers. Since the carriers cannot, consistent with the shipping laws, implement the direct mandate of the Rules on Containers, the right of control test applies and requires the conclusion that the Rules on Containers cannot be enforced consistent with the NLRA.

As this Court stated under the "right of control test" outlined in *Pipefitters,* an otherwise lawful agreement for work preservation may nevertheless violate the Act if the contracting employer lacks the "power to give the employees the work in question"; for "if the contracting employer has no power to assign the work, it is reasonable to infer that the agreement has a secondary objective, that is, to influence whoever does have such power over the work" *ILA* 447 U.S. 504. Therefore, this Court directed that even if, on remand, the Board found "a lawful work preservation objective" the Board should then consider whether the employers "did not have the right to control" the disputed work. *Id.* at 511, 512.

"Power," as used by the Supreme Court in the context of the right to control test, includes the *legal*

ability or right to agree to the union demands. This is not the manner in which Judge Harmatz uses "power," as he states "as the job guarantees embodied in said Rules take effect as pre-condition to the release of containers said obligations are imposed upon signatory employers at a time when the latter possess *power* to comply" Jt. App. 153a (emphasis added).

Under this analysis, the right of control test would have been rejected in *Pipefitters*. There the subcontractors had an agreement with the union to perform all cutting and threading of pipe on the job site. The general contractor who had subcontracted heating and airconditioning work to the subcontractor, specified the use of factory installed pipe. Despite that contract, the subcontractor had the *"power"* to order uncut and unthreaded pipe to be cut and threaded on the job site in disregard of his legal obligation under the contract. If the Court had adopted Judge Harmatz' view, granting paramount concern to the collective bargaining agreement, the union's refusal to handle the precut and prethreaded pipe would have been upheld and the current law would be summarized in Judge Harmatz' maxim—the employers "having failed to honor their commitments to the ILA, are fair game for primary strike action . . . ." Jt. App. 178a, 179a n.95.

The Board's and this Court's recognition in *Pipefitters* of the validity of contract, and applicable principles of contract law, rendered the union's refusal to handle an unlawful secondary objective. Here in directly analogous circumstances, by affording recognition to the validity of common carrier legal obligations, the requirements of the Shipping Act, 1916

and the Intercoastal Shipping Act, 1933, as well as contractual obligations of the carriers' tariffs and bills of lading, the Board and the Court of Appeals should have found, that under the right of control test, the employers have no *legal* right to implement the Rules on Containers, and therefore the union's conduct has an unlawful secondary objective.

Section 14 (Fourth) of the Shipping Act 1916 (Shipping Act) 46 U.S.C. Section 812 (1976) makes it unlawful for any "common carrier by water" to "unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodation or other facilities." Section 16 (First) of the Act prohibits a common carrier by water from giving "any undue or unreasonable prejudice or disadvantage in any respect whatsoever."[7] Section 18(a) requires a carrier by water to provide "just and reasonable rates, fares, or charges, classifications, and "just and reasonable regulations and practices relating thereto . . . and all other matters relating to or connected with the receiving, handling, transporting, storing, or delivery of property."[8]

The Rules on Containers implemented by the contracting employers as carriers have been held to be violations of sections 14 Fourth, 16 First, 17, 18(a) and 18(b) of the Shipping Act, 1916 and sections 2 and 4 of the Intercoastal Act, 1933 whether as included in tariff provisions of the carriers or as prac-

---

[7] 46 U.S.C. Section 812j (1976). Section 812, 46 U.S.C. Section 815 (1976).

[8] 46 U.S.C. Section 817 (1976).

tices which should be included in tariff provisions.[9]

The FMC, in holding the Rules violated Sections 14, 16 and 18 (1916 Act) and Section 4 (1933 Act) by subjecting some containers to stripping and restuffing and arbitrarily denying some shippers containers (*Sea-Land Service, Inc. et al. Rules on Containers, supra*) stated in full the legal obligations imposed on the carriers by the Shipping Act:

> PRMSA will not supply PRMSA containers to certain consolidators and deconsolidators, whereas PRMSA will supply its containers to other shippers and consignees in the same geographic area. PRMSA's rules on containers unfairly treat and unjustly discriminate against certain consolidators and deconsolidators inasmuch as PRMSA does not provide them the same facilities (con-

---

[9] See Sea-Land Service, Inc.—Proposed Rules on containers, 16 S.R.R. (P & F) 315 (ALJ Initial Decision, *aff'd*, 18 SRR (P & F) 553 (FMC 1978) *aff's sub nom, Conasa* v. *FMC*, 672 F 2d 171 (D.C. Cir 1982) *cert. denied* 103 S. Ct. 69 (Oct. 1982) D.C. Cir. remanded in light of *ILA* and *FMC* v. *PMA* 435 U.S. 40 (1978). On remand the FMC aff'd its previous decision *Sea Land Service—Proposed Rules on Containers* 21 S.R.R. (P & F) 853 (1982). On July 2, 1982 D.C. Cir. vacated FMC's dismissal of further proceedings in its report on Remand and ordered FMC to defer action till completion of Supreme Court consideration of Petition for writ in *Conasa* (supra) and completion of FMC consideration of FMC Dkt 81-11, the current hearing on the 1981 implementation of the Rules 21 SRR (P & F) 1057 (1982). Decision of the administrative Law Judge in Dkt 81-11 is pending. The D.C. Circuit did not set aside the FMC findings on the merits. See also *South Atlantic and Caribbean Lines, Inc.*, 12 FMC 237, 241-242 (1969); *U.S.* v. *Sea-Land Service, Inc.* 424 F. Supp. 1008, 1011, 1112 (D.N.J. 1977) appeal dismissed 577 F.2d 730 (3rd Cir. 1978), cert. denied 439 U.S. 1072 (1979); *Consolidated Express, Inc.* v. *Sea-Land Service, Inc.*, 16 S.R.R. 817, 822-830 (1976).

tainers) as PRMSA provides other shippers and consignees, in violation of section 14 Fourth.

PRMSA's rules on containers are in violation of section 14 Fourth insofar as these rules permit certain container loads to move freely over facilities of PRMSA, that is, over the piers, while PRMSA's rules also require other similar container loads to be stripped and restuffed at the piers by ILA deep sea labor. The unlawful discrimination results from the unequal availability of the piers for movement of container loads to and from ships. Clearly, PRMSA's tariff rules on containers unfairly treat and unjustly discriminate against certain shippers and consignees in the matter of cargo space accommodations and other facilities, including the use of the piers and the use of containers for consolidated shipments.

* * * * * * * * * * * * * * *

PRMSA's rules on containers are in violation of section 16, First, in that they unduly prefer certain shippers and consignees, such as for example those who have certain facilities and whose employees stuff and strip containers, while these rules subject other shippers and consignees to undue and unreasonable prejudice and disadvantage, such as for example those shippers and consignees who do not have their own facilities or do not have their own employees to stuff and strip containers.

* * * * * * * * * * * * * * *

[The] rules are unreasonable in a number of other ways, including that they deny containers to some shippers while providing containers to other shippers, and that the rules require certain consignees to warehouse their imports under certain restrictions while not so requiring other consignees to so warehouse their products. [The] rules on containers are unjust and unreasonable in violation of section 18(a) of the 1916 Act and of section 4 of the 1933 Act.

> . . . all shippers should be treated substantially equally, provided of course that they seek and receive the same ocean transportation service from the same ocean common carrier. *Proposed Sea-Land Services, Inc., Rules on Containers,* 16 SRR 315.

The FMC held that such rules are unlawful regardless of whether the rules were lawful under labor law. In so doing, the FMC relied upon several leading cases that firmly established the principle that parties to collective bargaining agreements cannot ignore requirements imposed by other laws.[10] Applying this principle in the context of the Shipping Act, Justice Harlan concurring in *Volkswagenwerk* v. *FMC* stated:

> Multi-employer collective bargaining must therefore be reconciled with the sometimes competing policies of federal laws promoting and regulating competition, viz. the antitrust laws and in the case of maritime labor relations, the Shipping Act.
>
> 390 U.S. 261 (1968) (Harlan, J., concurring).

Carriers may set rates, charges and establish practices so long as they are consistent with common carrier obligations. These obligtions, deeply rooted in common law and codified in the shipping statutes, are: (1) a duty to treat all shippers alike—large shippers, small shippers, shippers far from the port or within fifty miles of the port (46 USC 815, 816); (2) a duty to establish reasonable practices relating

---

[10] See United Mineworkers v. Pennington, 381 U.S. 657, 664-65 (1965).

to the receipt, handling and delivery of freight (46 USC 816); (3) a duty to treat all shippers fairly and without discrimination in matters of cargo space accommodations or other facilities or the loading and handling of freight (46 USC 812).

Containers have regularly been supplied by carriers—and since they are supplied to some shippers, they *must be supplied* to all shippers. Even carriers which do not operate cellular or roll-on/roll-off container vessels supply containers. Sometimes these containers are the 20 or 40 ft. trailer body; sometimes truck trailers (with wheels); sometimes lift vans or Dravo or Conex boxes. Under the shipping laws, once the carrier has decided to make containers available, the carrier must supply all shippers with the equipment.

Similarly, the carrier cannot require the unstuffing (or stripping) and reloading of containers of some shippers at the piers while not requiring it of other shippers without violating shipping laws.

The fundamental consideration is whether whatever services are furnished by the carrier are offered on a reasonable and nondiscriminatory basis. See, *e.g.*, *Grace Line, Inc.* v. *FMB,* 280 F. 2d 790, 792-793 (2nd Cir. 1960), *cert. denied,* 364 U.S. 933 (1961); *Swayne & Hoyt, Ltd.* v. *U.S.,* 300 U.S. 297, 303 (1937).

It is also clearly established that a carrier may not discriminate against cargo on the basis of who owns the goods transported, and that, as a shipper, a consolidator or NVOCC must be given the same treatment as any other shipper. See e.g., *ICC* v. *Delaware, L. & W. R.R.,* 220 U.S. 235, 252 (1911). Moreover,

a carrier may not justify discriminatory treatment of shippers even on the basis that a shipper competes with the carrier. *See, e.g., American Trucking* v. *Atchison T. & S.F.R. Co.*, 387, 406-408 (1967); *Isbrandtsen Co., Inc., et al.* v. *States Marine, et al.*, 6 F.M.B. 422, 446-447 (1961), affirmed in relevant part *sub nom. States Marine Lines, Inc.* v. *FMC*, 114 U.S. App. D.C. 225, 227, 313 F.2d 906, 908 (1963), *cert. denied*, 374 U.S. 831 (1963).

It has been uniformly recognized, moreover, that the obligation of common carriers to provide service for all indiscriminately is not removed by the presence of "hot cargo" clauses in collective bargaining agreements. *See, e.g., Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617, 625-630 (1957); *Carpenter's Union* v. *Labor Board*, 357 U.S. 93, at 109-111 (1958); *Merchandise Warehouse Co.* v. *A.B.C. Freight For. Corp.*, 165 F. Supp. 67, 75, (SD Ind. 1958). In fact, even "peaceful picket lines coupled with union contractual provisions acquiesced in by the carriers" has been held not to excuse the carriers' obligation or to allow it to interfere with the rights of persons not parties to a collective bargaining agreement. *See, e.g., Pickup and Delivery Restrictions, California, Rail*, 303 I.C.C. 579, 594 (1958). Even a strike by a carrier's own employees does not completely relieve it of its obligations under transportation law. *Railway Employees* v. *Florida E.C.R. Co.*, 384 U.S. 238, 244-245 (1966). Indeed, a carrier must provide service to a particular shipper at the risk of a total labor shutdown forcing it out of business. See *Montgomery Ward & Co.* v. *Northern Pacific Term. Co.*, 128 F. Supp., 475, 518 (D.Ore. 1953).

Since containers are "transportation facilities" their ownership is irrelevant and carriers are not free to discriminate as between shippers with respect to the service provided. *Cf. Grace Line, Inc.* v. *FMB,* 280 F.2d 790, *supra.* Thus, the statements by carrier executives, that containers of the ocean carriers are exclusively theirs, and that they own them, insure them, maintain them, etc. are irrelevant to the issues here.

Thus, in adopting measures to ease the unemployment impact of revolutionary changes involved in containerization, the carriers and the unions may not disregard other laws while bargaining under the labor laws and must reconcile any resolutions adopted in collective bargaining with competing policies of other federal laws, which, in the case of maritime labor relations includes the Shipping Act, 1916.[11]

For example, the Supreme Court held in *Volkswagenwerk* that an assessment formula to establish a compensation fund, as a solution to precisely what is involved in the current 50-mile container rules cases before the Board, i.e., mitigation of the impact on employees of technological unemployment resulting from containerization, violated sections of the Shipping Act because the assessment formula discriminated as between shippers in several ways, including the receiving, handling, storing and delivering of cargo. Thus, the carriers' discretion in or control over, collectively bargained resolutions of these prob-

---

[11] Thus, a particular definition of the work in controversy or the ultimate legality of the Rules under labor laws will not determine their legality under the Shipping Act.

lems is constrained by the requirements of the Shipping Act.

Additionally, the FMC also declared that carrier-employers of ILA may not lawfully change existing tariff rules which encourage, through compensating consolidation allowances, consolidation of cargo in containers by NVOCC-consolidators off-pier. The Commission found that NVOCC-consolidators provide a valuable service to their shipper-customers and ocean carriers alike, that the NVOCC-consolidation industry serves a useful transportation purpose and is in the public interest and that maintenance of the consolidation allowance system is in the public interest and that action to eliminate, or effectively to eliminate, the system is *prima facie* contrary to the public interest. *Cancellation of Consolidation Allowances Rules, FMC* Dkt. 76-35, 18 SRR 637, 648 (1978).

In sum, the Shipping Act forbids ocean carriers to condition the use of containers by NVOCCs upon compliance with the Rules or to impose different cargo handling requirements upon some shippers and not others. Since carriers lack the legal right under the shipping laws and their contracts of carriage to selectively withhold containers and container services, the contracting employers lacked discretion to accede to the union's desires.

In his decision, Judge Harmatz took the position that the "administrative-judicial process is most effectively served by each agency acting on its own in the area of its special expertise." Jt. App. 171a.

By ignoring the shipping law requirements, however, Judge Harmatz violated well-estabished prece-

dent that requires the NLRB to give effect to Congressional enactments other than labor laws. *See, e.g., Southern Steamship Co.* v. *NLRB,* 316 U.S. 314 (1942). Moreover, Judge Harmatz mistakenly relies upon Local 1976, *United Brotherhood Carpenters* v. *NLRB,* (Sand Door) 357 U.S. 93 (1958) which does not preclude the Board from considering the FMC decisions in the present case. Significantly, *Sand Door* was decided before the enactment of section 8(e) and prior to the *Pipefitters'* right of control test.

In sum, Judge Harmatz' refusal to apply the right of control standards in this case, and the Board's and the Court of Appeals affirmance of that decision, are contrary to established precedent and disregard this Court's directive in *ILA* to apply the right of control test on remand. It is clear, under *Pipefitters,* the Union's objective and enforcement efforts are secondary and unlawful under sections 8(e) and 8 (b)(4) of the Act.

The Court of Appeals decision that Maritime law may be disregarded in determining the employer's right to control the disputed work and instrumentalities of commerce is a dangerous precedent which this Court should correct.

CONCLUSION

The Petition for a Writ of Certiorari should be granted as to the question presented.

Respectfully submitted,

RAYMOND P. DEMEMBER
Suite 400
3251 Old Lee Highway
Fairfax, Virginia 22030
(703) 691-0900

Counsel For Petitioners

Office - Supreme Court, U.S.
FILED
DEC 28 1984
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-861

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC., and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-869

HOUFF TRANSFER, INC.,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS.

BRIEF FOR RESPONDENTS

(Additional captions and names of attorneys appear on inside front cover)

BEST AVAILABLE COPY

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs; FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC.; TWIN EXPRESS, INC.; and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO; NEW YORK SHIPPING ASSOCIATION, INC.; and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
90 Broad Street
Suite 600
New York, New York 10004
(212) 425-3240

Attorneys for International Longshoremen's Association, AFL-CIO

C. P. LAMBOS
DONATO CARUSO
LAMBOS, FLYNN, NYLAND & GIARDINO
29 Broadway (9th Floor)
New York, New York 10006
(212) 943-2470

Attorneys for New York Shipping Association, Inc.

FRANCIS A. SCANLAN
DEASEY, SCANLAN & BENDER, LTD.
2 Girard Plaza
Philadelphia, Pennsylvania 19102
(212) 569-2333

Attorneys for Council of North Atlantic Shipping Associations

BEST AVAILABLE COPY

Table of Authorities

Cases: PAGE

Consolidated Express, Inc. v. *New York Shipping Association,* 452 F. Supp. 1024 (D.N.J. 1977), *modified on other grounds,* 602 F.2d 494 (3d Cir. 1979), *vacated and remanded,* 448 U.S. 902 (1980), *on remand* 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied,* 451 U.S. 905 (1981) 2n

50 Mile Container Rules, FMC No. 81-11 ..... 4n

Humphrey v. *International Longshoremen's Association,* 401 F. Supp. 1401 (E.D. Va. 1975), *rev'd,* 548 F.2d 494 (4th Cir. 1977) 2n

In re International Longshoremen's Association, No. 84-1973 (4th Cir. filed Sept. 14, 1984) 5n

International Longshoremen's Association v. *NLRB,* 613 F.2d 890 (D.C. Cir. 1979), *aff'd,* 447 U.S. 490 (1980) 2n

International Longshoremen's Association v. *NLRB,* 537 F.2d 706 (2d Cir. 1976), *cert. denied,* 429 U.S. 1041, *reh'g denied,* 430 U.S. 911 (1977) 2n

International Longshoremen's Association (Consolidated Express, Inc.), 221 N.L.R.B. 956 (1975) 2n, 6

Intercontinental Container Transport Corporation v. *New York Shipping Association,* 426 F.2d 884 (2d Cir. 1970) 2n

NLRB v. *International Longshoremen's Association,* 447 U.S. 490 (1980) 2n, 3

United States v. *Stauffer Chemical Co.,* —— U.S. ——, 104 S. Ct. 575, 78 L. Ed.2d 388 (1984) (No. 82-1448).... 3n

Rules:

Sup. Ct. R. 17.1(c) 2n

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

Nos. 84-861, 84-696, 84-677,
84-869, 84-691, 84-684

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION,
AFL-CIO, *et al.*

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS

In the 117 pages of their six separate petitions, ten petitioners have been unable to assert a single reason why the Court should grant certiorari in this case. They have articulated no question of law requiring Supreme Court review.[1] They concede there is no conflict among the cir-

---

[1] The questions framed in the petitions run the gamut from "[w]hether the National Labor Relations Board correctly concluded" (No. 84-861) to "[w]hether the court of appeals erred" (No. 84-684) to "[d]id the Court of Appeals apply the proper legal criteria" (No. 84-696) to "[w]as the Circuit Court correct in overturning the NLRB decision?" (No. 84-677). It is difficult to see how the answer to any of these questions would add to the development or clarification of federal labor law.

cuits.[2] Although they argue that the case is important, since it involves a major industry, they can point to no significant issue of law or policy that should be decided by the highest court. They cite no decision of this Court with which the Fourth Circuit's is in conflict.[3] They invoke an unknown ground for certiorari—"the last clear chance doctrine."[4] The entire thrust of the six petitions is dissatis-

---

[2] Indeed, there would appear to be complete harmony. Every jurist who has defined the work in controversy as this Court did in *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490 (1980), arrived at the same conclusion reached by the court of appeals below. *See Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970); *Int'l Longshoremen's Ass'n (Consol. Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman); *Int'l Longshoremen's Ass'n* v. *NLRB*, 537 F.2d 706, 712-14 (2d Cir. 1976) (Feinberg, J. dissenting), *cert. denied*, 429 U.S. 1041, *reh'g denied*, 430 U.S. 911 (1977); *Humphrey* v. *Int'l Longshoremen's Ass'n*, 401 F. Supp. 1401 (E.D. Va. 1975) (Merhige, J.), *rev'd*, 548 F.2d 494, 500-01 (4th Cir. 1977) (Craven, J. dissenting); *Consol. Express, Inc.* v. *New York Shipping Ass'n*, 452 F. Supp. 1024, 1040 n.14 (D.N.J. 1977) (Stern, J.), *modified on other grounds*, 602 F.2d 494 (3d Cir. 1979), *vacated and remanded*, 448 U.S. 902 (1980), *on remand* 641 F.2d 90 (3d Cir.), *mandamus and prohibition denied*, 451 U.S. 905 (1981); *Int'l Longshoremen's Ass'n* v. *NLRB*, 613 F.2d 890 (D.C. Cir. 1979), *aff'd*, 447 U.S. 490 (1980).

[3] The only conflict which the petition on behalf of the National Labor Relations Board (No. 84-861 Petition at 29) can conjure up is not with a decision of this Court but only with a "rationale." Certiorari may be appropriate if a conflict exists with a decision. Sup. Ct. R. 17.1(c). No authority, however, sanctions Supreme Court review for only a disagreement in rationale. Moreover, there is no conflict. The "rationale" to which the petitioner alludes is not that of this Court but of one of the litigants in an earlier case. The petition manufactures the putative rationale by extracting a single word, "eliminated," used by the Court to describe the contention raised by a party. *NLRB* v. *Int'l Longshoremen's Ass'n*, 447 U.S. 490, 510-11 (1980).

[4] Two petitions (No. 84-696 Petition at 22; No. 84-861 Petition at 22-23, 29-30) contend that this case will probably represent the last opportunity for this Court to review the Rules on Containers. These petitioners seem to be under the misimpression that the Supreme Court is now a standing tribunal to pass on this single

(footnote continued on following page)

faction with the result below. They ask the Court to eschew its proper function and to sit simply as another layer in the appellate process.

This Court has already established the legal principles that govern the decision in this case. *NLRB* v. *International Longshoremen's Association,* 447 U.S. 490 (1980). The Court of Appeals for the Fourth Circuit easily applied them to correct a patent error of law in the decision of the National Labor Relations Board. This Court had directed the Board to decide whether the work retained by the Rules, *i.e.*, the stuffing and stripping of carriers' containers at the piers, is the historical and functional equivalent of traditional longshore work. 447 U.S. at 507. The Board, affirming its administrative law judge, found that it is and so held that the Rules on Containers are lawful work preservation provisions (Petitioners' Appendix at 53a, 59a, 119a). The court of appeals affirmed (Petitioners' Appendix at 24a). This Court had directed the Board to decide whether the longshoremen's employers had the right to assign this work to them. The Board, again affirming its administrative law judge, found that the longshoremen's employers do have the right of control (Petitioners' Appendix at 51a-52a). Once more, the court of appeals affirmed (Petitioners' Appendix at 24a).[5]

(footnote continued from previous page)

collective bargaining agreement. Moreover, the Court in another context recently refused to credit the hobgoblin of a last chance attitude. *See United States* v. *Stauffer Chemical Co.*, —— U.S. ——, 104 S. Ct. 575, 78 L. Ed.2d 388, 395 n.6 (1984) (No. 82-1448). Petitioners in this case would have been well-advised to heed the Court's instruction that there is no need to "seek certiorari from adverse decisions when such action would otherwise be unwarranted" merely out of fear that no future opportunity will arise, especially since the Court let it be known that it would not alter its "practice of waiting for conflicts to develop before granting the government's petitions for certiorari." 78 L.Ed.2d at 395 n.6.

[5] Some of the petitioners urge that the ALJ, the Board and the court of appeals were all wrong in finding right of control (No.

(footnote continued on following page)

Having completed the task assigned by this court, the Board then wandered into a manifest error of law. Despite its holding that the Rules retain for longshoremen the functional and historical equivalent of their traditional work, the Board concluded that these same Rules were unlawful when applied to containers destined for short-stopping or warehousing (Petitioners' Appendix at 59a-60a). The Board predicated this determination upon the theory that an agreement to retain work that has been eliminated is unlawful. It attempted to lend credibility to this theory by affixing the label "work acquisition" to the challenged agreement, despite the absence of any factual finding that off-pier work functions were or could be transferred to the longshoremen.[6]

The court of appeals had no difficulty disposing of the Board's error. It applied longstanding and well-settled principles of federal labor law which leave no doubt that an agreement to retain work that technological change has

---

(footnote continued from previous page)

84-691 Petition at 13-24; No. 84-696 Petition at 17-21). They claim that these tribunals should have taken into account the proscriptions of federal shipping law in determining the legality of the Rules under federal labor law. The approach suggested would require the NLRB to decide difficult questions arising under the shipping statutes which the Federal Maritime Commission, the agency to which Congress has entrusted this task, has not yet resolved. The legality of the Rules under federal shipping law is presently before the FMC. *See 50 Mile Container Rules*, FMC No. 81-11. These shipping law questions are hardly ripe for review by this Court.

[6] Some of the petitioners seek to supply the missing factual finding by constructing scenarios in which off-pier work might be lost (No. 84-861 Petition at 27-28; No. 84-869 Petition at 15; No. 84-696 Petition at 12; No. 84-684 Petition at 10 n.7). None of these hypothetical occurrences is alleged to have happened in fact. None was invoked by the Board as a basis for its decision. None is a necessary consequence of the Rules but comes about only as a result of the choice of off-pier employers.

eliminated as a necessary function is perfectly permissible primary activity (Petitioners' Appendix at 26a-29a).[7]

The plea for a "definitive resolution of the validity of the Rules" (No. 84-861 Petition at 28) is disingenuous. The Fourth Circuit's decision is definitive.[8] It brings the verdict on the Rules into congruence with the law enacted by Congress and elucidated by this Court. It puts to rest all uncertainties concerning the validity of the Rules and thus achieves the labor stability which the Board purportedly espouses. It is the Board which would prolong the discord, not to seek a definitive resolution but a favorable one.[9]

Litigation over the Rules on Containers over the past 15 years since their adoption has consumed an inordinate amount of judicial and administrative resources. It has

---

[7] The bulk of every petition is devoted to an attempt to reargue the merits of the case before the Fourth Circuit. This is inappropriate in an application for a writ of certiorari and, accordingly, this brief will not respond in kind. However, respondents are appending their reply brief below, should the Court wish to know their position on the merits.

[8] The decision of a United States court of appeals is definitive, notwithstanding the Board's refusal to admit it. The NLRB makes no bones about its policy of disregarding decisions of federal appellate courts with which it is displeased. Although this policy has been strongly criticized by ten circuits, the Board persists. Its refusal to abide by the decision in this case, pending application to this Court, prompted respondents to petition for writs of mandamus and prohibition to compel the Board to comply by discontinuing further litigation it had initiated against the Rules in derogation of the decision of the court of appeals. *In re Int'l Longshoremen's Ass'n*, No. 84-1973 (4th Cir. filed Sept. 14, 1984).

[9] Inexplicably, the Board has indicated its intent (No. 84-861 Petition at 22 n.8) not to oppose the petitions which seek review of that portion of the decision below which sustained the validity of the Rules, where a unanimous court affirmed a unanimous Board in affirming its administrative law judge. With that kind of unanimity, one would think that those issues at least have been definitively adjudicated. It is difficult to reconcile the Board's willingness to reopen these issues with its goal of certainty and stability.

generated 13 circuit court, 14 district court and 10 NLRB proceedings, as well as two determinations on the merits by this Court. The decision of the court of appeals below has brought the wheel full circle. The status of the Rules on Containers is precisely where it was after the first ALJ found them to be lawful work preservation provisions almost a decade ago. *International Longshoremen's Association (Consolidated Express, Inc.)*, 221 N.L.R.B. 956, 979 (1975) (ALJ Arnold Ordman). The time has come to say "Enough!" The pique of disappointed litigants is no basis to add another unnecessary chapter. There is no reason for Supreme Court review. The petitions should be denied.

Dated: New York, New York
December 27, 1984

Respectfully submitted,

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
90 Broad Street
Suite 600
New York, New York 10004
(212) 425-3240
Attorneys for International Longshoremen's Association, AFL-CIO

C. P. LAMBOS
DONATO CARUSO
LAMBOS, FLYNN, NYLAND & GIARDINO
29 Broadway (9th Floor)
New York, New York 10006
(212) 943-2470
Attorneys for New York Shipping Association, Inc.

FRANCIS A. SCANLAN
DEASEY, SCANLAN & BENDER, LTD.
2 Girard Plaza
Philadelphia, Pennsylvania 19102
(215) 569-2333
Attorneys for Council of North Atlantic Shipping Associations

ADDENDUM

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC. and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

No. 83-1214

INTERNATIONAL ASSOCIATION OF NVOCCS, FLORIDA CUSTOMS BROKERS AND FORWARDERS ASSOCIATION, INC., TWIN EXPRESS, INC., and INTERNATIONAL CONTAINER EXPRESS, INC.,

Petitioners,

and

SAN JUAN FREIGHT FORWARDERS, INC.,

Intervenor,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 83-1424

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, HAMPTON ROADS DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ATLANTIC COAST DISTRICT COUNCIL; INTERNATIONAL LONGSHOREMEN'S DISTRICT COUNCIL, BALTIMORE, MARYLAND; ILA LOCALS 333, 846, 862, 921, 953, 970, 1248, 1355, 1416, 1416A, 1429, 1458, 1526, 1526A, 1624, 1680, 1736, 1783, 1784, 1819, 1840, 1922, and 1970, AFL-CIO; HAMPTON ROADS SHIPPING ASSOCIATION; SOUTHEAST FLORIDA EMPLOYERS PORT ASSOCIATION; COORDINATED CARIBBEAN TRANSPORT, INC.; CHESTER BLACKBURN & RODER, INC.; EAGLE, INC.; ELLER & COMPANY, INC.; STRACHEN SHIPPING COMPANY; and MARINE TERMINALS, INC.,

Respondents.

SHIPPING GROUP'S REPLY BRIEF

No. 83-1486

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, TIDEWATER MOTOR TRUCK ASSOCIATION, and AMERICAN TRUCKING ASSOCIATIONS, INC.,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
90 Broad Street
New York, New York 10004
(212) 425-3240
Attorneys for International Longshoremen's Association, AFL-CIO

C.P. LAMBOS *(Lead Counsel)*
DONATO CARUSO
NICHOLAS G. MAGLARAS
LAMBOS, FLYNN, NYLAND & GIARDINO
29 Broadway (9th Floor)
New York, New York 10006
(212) 943-2470
Attorneys for New York Shipping Association, Inc.

FRANCIS A. SCANLAN
DEASEY, SCANLAN & BENDER, LTD.
2 Girard Plaza
Philadelphia, Pennsylvania 19102
(212) 569-2333
Attorneys for Council of North Atlantic Shipping Associations

BRADEN VANDEVENTER
VANDEVENTER, BLACK, MEREDITH & MARTIN
2050 Virginia National Bank Building
Norfolk, Virginia 23510
(804) 622-4381
Attorneys for New York Shipping Association, Inc. and Council of North Atlantic Shipping Associations

TABLE OF CONTENTS

PAGE

As to the Trucking Group 1

As to the NLRB 3

1. The Board's Decision 3
2. The Board's Brief 5
3. The Controlling Law 10

Conclusion 14

Table of Authorities

Cases:

American Boiler Manufacturers Association v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970) 4, 6

Austin v. *Jackson*, 353 F.2d 910 (4th Cir. 1965) 5n

Burlington Truck Lines, Inc. v. *United States*, 371 U.S. 156 (1962) 5n

Edward J. DeBartolo Corp. v. *NLRB*, 662 F.2d 264 (4th Cir. 1981) 5n

FPC v. *Texaco, Inc.*, 417 U.S. 380 (1974) 5n

International Longshoremen's Association v. *NLRB*, 198 U.S. App. D.C. 157, 613 F.2d 890 (1979), *aff'd*, 447 U.S. 490 (1980) ..... *passim*

Local 1976, Carpenters v. *NLRB*, 357 U.S. 93 (1958) 2

Meat Drivers Local 710 v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709 (1964) 4-5, 6-7

NLRB v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) 13

PAGE

NLRB v. *Brown*, 380 U.S. 278 (1965) 13

NLRB v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507 (1977) 8, 9n, 12

NLRB v. *Local 825, Operating Engineers*, 400 U.S. 297 (1971) 9, 9n

National Woodwork Manufacturers Association v. *NLRB*, 386 U.S. 612 (1967), *aff'g in part and rev'g in part* 354 F.2d 594 (7th Cir. 1966) .....*passim*

Painters & Paperhangers Local 27 (Joliet Contractors Association), 99 N.L.R.B. 1391 (1952), *aff'd sub nom. Joliet Contractors Association* v. *NLRB*, 202 F.2d 606 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953) 7, 8, 8n

Plumbers Local 636 (Mechanical Contractors Association), 189 N.L.R.B. 661 (1971) 7n

Sea-Land Service, Inc.—Proposed Rules on Containers, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations* v. *FMC*, 217 U.S. App. D.C. 318, 672 F.2d 171, *cert. denied*, 103 S. Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982) 2n

SEC v. *Chenery Corp.*, 332 U.S. 194 (1947) 5n

Statutes:

29 U.S.C. § 158(b)(4) (1976) .....*passim*

29 U.S.C. § 158(e) (1976) .....*passim*

United States Court of Appeals

FOR THE FOURTH CIRCUIT

No. 83-1185(L)

AMERICAN TRUCKING ASSOCIATIONS, INC., and TIDEWATER MOTOR TRUCK ASSOCIATION,

Petitioners,

and

HOUFF TRANSFER, INC., AMERICAN WAREHOUSEMEN'S ASSOCIATION and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervenors,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Intervenors.

ON PETITIONS TO REVIEW AND ON APPLICATIONS TO ENFORCE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

SHIPPING GROUP'S REPLY BRIEF

As to the Trucking Group:

The NLRB's and Shipping Group's principal briefs leave no doubt that the Rules on Containers are lawful work preservation provisions on their face. These briefs dispose of the contentions advanced by the Trucking Group.

The work preservation argument that the Trucking Group urges depends upon the existence of a "new intermodal transportation system" into which it claims that the work of stuffing and stripping the longshore employers' containers has been inseparably integrated (Trucking Group's Brief ("TGB") at 12-31). Both the ALJ and the

Board found otherwise (Bd at 16 (A. 163); ALJ at 31-37 (A. 44-50)). Their factual determinations are supported by an abundance of record evidence (A. 254, 258, 266-67, 322, 342-43, 351-52, 383-89, 426-28, 432-33, 452-54, 469-71, 545, 598-99). Moreover, the Trucking Group's argument has already been rejected by the District of Columbia Circuit. *International Longshoremen's Association* v. *NLRB ("ILA")*, 198 U.S. App. D.C. 157, 613 F.2d 890, 909-10 & n.173 (1979), *aff'd*, 447 U.S. 490 (1980). The Trucking Group's obstinate adherence to its discredited theory is futile.

The Trucking Group's right of control argument rests upon two fictions. First, it claims that the Board never considered the right of control issue (TGB at 32-37)—an untenable contention in light of the ALJ's careful analysis (ALJ at 58-60, 75 (A. 71-73, 88)), which was adopted by the Board (Bd at 18 n.30 (A. 165)). Second, the Trucking Group's invocation of contractual common-carrier obligations (TGB at 37-45) would require the NLRB to determine the validity of the Rules on Containers under federal shipping law—an endeavor the Federal Maritime Commission has not yet been able to complete to the satisfaction of an appellate court.[1] The Board correctly declined to trespass upon an area beyond its jurisdiction, *Local 1976, Carpenters* v. *NLRB ("Sand Door")*, 357 U.S. 93, 110-11 (1958), and rightfully branded any linkage of the outcome of this labor law case to the uncertainties of pending FMC litigation "mischievous." (ALJ at 72 (A. 85)).

---

[1] *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1 (1978), *aff'd in part and remanded in part sub nom. Council of North Atlantic Shipping Associations* v. *FMC*, 217 U.S. App. D.C. 318, 672 F.2d 171, *cert. denied*, 103 S. Ct. 69 (1982), *on remand* Nos. 73-17 & 74-40 (FMC May 19, 1982), *vacated and remanded*, No. 78-1776, Supplemental Opinion Following Remand (D.C. Cir. July 2, 1982), *reh'g en banc denied*, No. 78-1776 (D.C. Cir. Sept. 23, 1982).

As to the NLRB:

The only real issue in this case is the legal soundness of the Board's trucking and warehouse rulings. The NLRB's brief ("NB") leaves no doubt that this issue is purely one of law (NB at 50-54).

1. *The Board's Decision*

The Board's ruling invalidated application of the Rules to certain trucking and warehouse operations purportedly because it was work acquisition (Bd at 26-27 (A. 173-74)). The Shipping Group's Brief ("SGB") showed that the conclusion of work acquisition was a mere assumption unsupported by any finding of fact or record evidence (SGB at 42-49). Indeed, the Shipping Group demonstrated that the stripping/stuffing of containers at the piers can in no way lessen the work performed by trucking or warehouse employees at off-pier sites (SGB at 42-46). Since, without work loss, there can be no acquisition, the Shipping Group exposed the Board's finding of illegality as one predicated solely on its conclusion that longshore work has been "eliminated." (SGB at 47-48).

The Board's brief to this court concedes the correctness of the Shipping Group's analysis. The NLRB has now abandoned any pretense of work acquisition. The word "acquisition" appears four times in the 64 pages of the Board's brief (NB at 23, 39, 49), but only once in connection with the Board's decision in this case (NB at 49). Even here, it is not given its ordinary meaning. It is dressed up in quotation marks, suggesting that the Board in its decision did not mean that longshoremen were in fact acquiring work in the real world but, rather, used the term "acquisition" as a technical catchword to denote unlawful activity.

Just as in the Board's and ALJ's decisions work acquisition is an assumption, not a finding of fact, so too

in the Board's brief to this court. There is not a single citation in that brief to any record evidence in support of a factual finding that application of the Rules to truckers and warehousemen caused longshoremen to acquire the off-pier employees' work. If work acquisition had really been a factual determination in its decision, one would expect the Board to point to those portions of the record that support its finding. After having received the Shipping Group's brief, which openly challenges any claim that off-pier work is being acquired, surely the Board's brief would have responded by supplying the missing evidentiary support. It does not because none exists. Instead, the Board jettisons "work acquisition" as a necessary element and now seeks to persuade this court that work "elimination" alone suffices to overcome the Board's own determination that the Rules are generally valid work preservation provisions.

The Board's brief confirms the Shipping Group's demonstration that the decision under review is predicated on the principle of law that eliminated work may not be the subject of a lawful work preservation agreement. The Board's brief states that "agreements to cease doing business in connection with claiming work that technology has eliminated are not primary agreements." (NB at 52). This is an error of law.

The Board cites no authority in support of its theory because neither the NLRB itself nor any judicial tribunal has ever endorsed it. The controlling authorities have consistently upheld agreements to preserve or reacquire eliminated work. *National Woodwork Manufacturers Association* v. *NLRB,* 386 U.S. 612 (1967), *aff'g in part and rev'g in part* 354 F.2d 594 (7th Cir. 1966); *American Boiler Manufacturers Association* v. *NLRB,* 404 F.2d 547 (8th Cir. 1968), *cert. denied,* 398 U.S. 960 (1970); *Meat Drivers*

Local 710 v. *NLRB*, 118 U.S. App. D.C. 287, 335 F.2d 709 (1964).

2. *The Board's Brief*

The Board's decision in this case rests upon the naked assertion that the attempt to preserve eliminated work is illegal work acquisition (Bd at 27 (A. 174)). In an effort to rescue this implausible postulate, the Board's counsel goes to even more extreme lengths, which, rather than salvage the Board's decision, actually underscore its fundamental infirmities. The Board's counsel conjures up something old and something new. He introduces a distinction never before voiced and dredges up an old discredited theory. Neither of these appear in the Board's decision.[2]

First, the Board's brief attempts to undermine the well-established law of work preservation by introducing a spurious distinction never before drawn either in the decision on review or in any prior case. The Board's counsel claims that the legality of the agreement turns on whether the work has been "eliminated" or "diverted." (NB at 52). This semantic game is devoid of legal significance.[3] From the point of view of the workers, it matters not whether the work has been transferred to another work site or gone to the Valhalla of the victims of tech-

---

[2] These *post hoc* rationalizations by agency counsel are unacceptable to support the decision on review. *FPC* v. *Texaco, Inc.*, 417 U.S. 380, 397 (1974); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-69 (1962); *Edward J. DeBartolo Corp.* v. *NLRB*, 662 F.2d 264, 271-72 n.6 (4th Cir. 1981). An appellate court must adjudge an administrative decision on the basis of the reasons articulated in the agency's decision itself. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Austin* v. *Jackson*, 353 F.2d 910, 912 (4th Cir. 1965).

[3] Board counsel's distinction is logically distorted. Manifestly, attempts to reinstate "diverted" work require a greater involvement of third parties than the resuscitation of "eliminated" work. Both are lawful work preservation, but the former is nearer the dividing line between primary and secondary activity.

nology. In either case, their work is lost, and the workers' efforts to compel their employer to return it are primary.

The controlling cases simply do not bear out Board counsel's attempted distinction. The Supreme Court in *National Woodwork* did not speak in terms of "diverted" or "displaced" work, but rather "employers' efforts to *abolish* . . . jobs." 386 U.S. at 640 (emphasis added). So too, the Eight Circuit in *American Boiler* and the District of Columbia Circuit in *Meat Drivers* sanctioned the recovery of *"lost"* work. 404 F.2d at 554; 335 F.2d at 712 (emphasis added). Moreover, the facts in these cases reveal that the work in controversy had been eliminated, not merely diverted. In *National Woodwork,* the work of cutting and fitting blank doors had been integrated into the manufacturing process. There were no carpenters at the manufacturers' plants to whom the work was diverted. The machines produced doors already fitted to their jambs. The work of mortising, routing and beveling had been eliminated by the prefabrication technology. The prepackaged boilers in *American Boiler* had the same work elimination effect. The manufacturing process had abolished, not diverted, the plumbers' on-site trimming work.

In *Meat Drivers,* the work of distributing meat products within the 50-mile Chicago area from a metropolitan processing plant had been eliminated by the establishment of a suburban plant. Distribution from the city plant was no longer a necessary step in the process of getting the meat from the suburban plant to the Chicago customers. The court of appeals upheld an agreement requiring the employer to have the meat transported first to the city plant thence to the customers by its employees at that plant rather than directly from the suburban plant to the customers by independent over-the-road truckers retained by the employer. *Meat Drivers* is particularly instructive

because it demolishes the Board's attempt in this case to introduce "duplication" as a disqualifying factor (Bd at 26-27 (A. 173-74)). Obviously, delivery directly from the suburban plant was a more economical, convenient and efficient practice. Transfer to the city plant was a duplicative, make-work step. Nevertheless, the city employees' insistence that it be done to reintroduce their lost work was lawful, primary activity, even though it had the effect of disrupting the employer's arrangements with the over-the-road contractors.[4]

Second, the Board's brief reaches back to an earlier era to urge that it is the "cease doing business" factor which makes the attempt to preserve eliminated work unlawful (NB at 53 and n.43). The case cited for this proposition, *Painters & Paperhangers Local 27 (Glaziers) (Joliet Contractors Association)*, 99 N.L.R.B. 1391 (1952), *aff'd sub nom. Joliet Contractors Association* v. *NLRB*, 202 F.2d 606 (7th Cir.), *cert. denied*, 346 U.S. 824 (1953), was decided not only prior to *National Woodwork* but also before the 1959 amendments to § 8(b)(4) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 158(b)(4) (1976), which introduced the proviso "that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."[5]

Prior to the enactment of the primary proviso, it was tenable to suggest that a violation could be predicated on a mere cessation of business. Indeed, the Seventh Circuit in reviewing *Glaziers* said "we are not convinced that

---

[4] The Board itself reached a similar result in *Plumbers Local 636 (Mechanical Contractors Ass'n)*, 189 N.L.R.B. 661 (1971) where a duplicative practice of disassembling and repiping prefabricated units was upheld as valid work preservation.

[5] The courts extended this primary proviso to agreements challenged under LMRA § 8(e), 29 U.S.C. § 158(e) (1976). *See National Woodwork*, 386 U.S. at 634-43.

a Union violation . . . is dependent upon whether its activities are primary or secondary." 202 F.2d at 610. Once Congress passed the proviso, however, *Glaziers* lost all precedential value, and a different mode of analysis was mandated.[6]

Under the present state of the law, three elements are necessary to establish a violation of LMRA § 8(b)(4) or § 8(e): (1) inducement (threats or coercion), (2) cessation of business, and (3) secondary objective. While it is still necessary to find a cessation of business, that element is no longer determinative. It must be shown that the cessation is a result of secondary, not primary, activity. The primary/secondary analysis is the crucial touchstone, and it is totally independent of the cessation of business element. The primary/secondary determination turns upon the motivation for the cessation. Where the cessation is the result of primary activity, no violation occurs. Thus, the Supreme Court has repeatedly held that the effect on third parties, *i.e.*, the cessation of business, "no matter how severe, is irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral." *ILA*, 447 U.S. at 507 n.22, *citing NLRB* v. *Enterprise Association of Steam, etc. Pipefitters*, 429 U.S. 507, 510, 526 (1977); *see also National Woodwork*, 386 U.S. at 627.[7]

---

[6] In its later determination in *National Woodwork*, the Seventh Circuit itself recognized the obsolescence of its prior affirmance of *Glaziers*. 354 F.2d at 598.

[7] This same analysis has been articulated by the Supreme Court:

> Under § 8(b)(4)(B) of the National Labor Relations Act, 29 USC § 158(b)(4)(B), a union commits an unfair labor practice when it induces employees to refuse to handle particular goods or products or coerces any person engaged in commerce, where 'an object' of the inducement or coercion is to require any person to cease doing business with any other person. A proviso, added to § 8(b)(4)(B) in 1959, declares that the section 'shall [not] be construed to make

(Footnote Continued on Succeeding Page)

The theory now proposed by the Board's counsel, which makes the cessation of business the crucial factor, would in effect repeal the primary proviso. Since even the most pristine primary work preservation agreement has some effect on third parties, which, as the Board reminds us, is sufficient to make out a cessation of business (NB at 29 n.26, *citing NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297 (1971)), virtually every work preservation agreement would be vitiated if Board counsel's view were to prevail.[8]

Board counsel's attempts to buttress the decision under review are unavailing. His diversion/elimination distinction and "cessation of business" theory are contrary to well-established precedent and to the express provisions of the statute. However, they serve one useful purpose. They betray a recognition that the Board's decision as ren-

---

(Footnote Continued From Preceding Page)

> unlawful, where not otherwise unlawful, any primary strike or primary picketing.' Although without the proviso the section on its face would seem to cover any coercion aimed at forcing a cessation of business, the National Labor Relations Board (Board) and the judiciary have construed the statute more narrowly, both before and after the proviso was added, to prohibit only secondary, rather than primary, strikes and picketing.
>
> Among other things, it is not necessarily a violation of § 8(b)(4)(B) for a union to picket its employer for the purpose of preserving work traditionally performed by union members even though in order to comply with the union's demand the employer would have to cease doing business with another employer.

Pipefitters, 429 U.S. at 509-10 (footnotes and citation omitted).

[8] The change in business practices which would constitute the "cessation of business" element of the Board's trucking and warehouse rulings in this case is minimal. It consists of the delivery of cargo to off-pier sites in a truck rather than a steamship carrier container. To the off-pier employees the vehicle in which the cargo is transported makes no difference. Their work is the same in either case. The change in business practices is so slight and insubstantial as to place in doubt whether the "cessation of business" element has in fact been established. *See Operating Engineers, supra,* 400 U.S. at 305. If the alleged "cessation" in this case suffices, what work preservation agreement could survive?

dered needs shoring. The fact that the best support Board counsel was able to devise is insufficient shows that the decision is indefensible.

3. *The Controlling Law*

The Board's trucking and warehouse rulings are unable to withstand scrutiny under the basic principles of the work preservation doctrine. In this case, however, there is a more definitive standard—the Supreme Court's decision in *ILA*, which dealt with this very litigation. The Board's rulings part company with *ILA* in every respect. The *ILA* Court admonished the Board for erroneously focusing "on the work done by the employees of the charging parties, the truckers and consolidators, after the introduction of containerized shipping." *Id.* at 507.[9] In its trucking and warehouse rulings, the Board continues to define the work in dispute as the post-containerization work performed by the trucking and warehouse employees (Bd at 24 (A. 171)).[10]

The *ILA* Court required the Board to focus on the longshoremen's work prior to the innovation and to evaluate the

---

[9] Neither the Supreme Court nor the District of Columbia Circuit in *ILA* nor any other tribunal which has addressed this case has ever made any distinction between application of the Rules to consolidators and their application to truckers and warehousemen. The reason is self-evident. The traditional work of longshoremen and the on-pier work the Rules seek to retain are the same whether the container comes from/goes to a consolidator, NVO, trucker or warehouseman. Regardless of the off-pier entity, the longshoremen perform the same work. The test in each instance remains the same: whether that work is historically and functionally related to traditional longshore work, and the Board has answered that question in the affirmative.

[10] Even if the Board's "elimination" theory were not legally erroneous, it would still be reversible error for the Board to apply that theory in this case. The Board disregards the Supreme Court's direction. It views the Rules on Containers in hindsight. While it is true that containerization had the potential for eliminating longshore work, this elimination with respect to warehousing and shortstopping had not occurred at the time that the Rules were adopted in 1969. From the inception of containerization un-

(Footnote Continued on Succeeding Page)

functional and historical relationship between this traditional longshore work and the work retained by the Rules. 447 U.S. at 507, 509-10. In its trucking and warehouse rulings, although it had already found that the work the Rules propose to preserve is functionally and historically related to traditional longshore work and has not been integrated into off-pier work practices (Bd at 16, 24-27 (A. 163, 171-74); *see also* NB at 34-37), the Board simply eschewed these critical findings and embarked upon its "elimination" theory.

The Board's theory cannot be reconciled with *ILA*. The Supreme Court recognized that the need for longshore work had been eliminated by containerization, 447 U.S. at 509, but did not consider this elimination to be a determinative factor. The Court mandated a further inquiry:

> whether the historical and functional relationship between this retained work and traditional longshore work can support the conclusion that the objective of the agreement was work preservation rather than the satisfaction of union goals elsewhere.

447 U.S. at 510 (footnote omitted). The Court thus zeroed in on the key factor for determining a violation of §§ 8(b)(4) and 8(e): whether the challenged agreement has a primary or secondary objective—an inquiry the Board

---

(Footnote Continued From Preceding Page)
til the 1973 Dublin Supplement, containers destined for stripping at local warehouses and trucking stations were routinely stripped at the piers (A. 1082-83, 1085-86, 1159-60, 1181). In the Dublin Supplement, the longshoremen agreed not to strip warehouse-bound containers but only on the condition that their contents be genuinely warehoused for the customary 30-day period. It was to preserve this work from elimination that the Rules were adopted. Any elimination that may have occurred thereafter resulted from 10 years of injunctions, not from "the technology, as the ILA agreed to have it operate." (NB at 49). Thus, the "elimination" upon which the Board's theory depends did not exist at the time the agreement was adopted, the temporal context in which, under the Supreme Court's decision, the Rules must be adjudged.

completely loses sight of in concocting its elimination theory.

The Supreme Court has repeatedly said that the "touchstone is whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* 386 U.S. at 645 (footnote omitted); *Pipefitters,* 429 U.S. at 511; *ILA,* 447 U.S. at 504. The Board had no difficulty finding that the agreement to have longshoremen stuff and strip their own employers' containers at their own employers' premises "had an overall work preservation objective." (Bd at 25 (A. 172)). The touchstone, therefore, was completely satisfied. In its trucking and warehouse rulings, the Board does not mention the touchstone. It offers no explanation how the longshoremen's "valid work preservation objective" becomes secondary when their agreement is applied to warehousemen and truckers. The fact that in those instances the Board believes the work has been "eliminated" in no way changes the primary nature of the agreement. The longshoremen are still bargaining with their own employers to have them revive the lost work. If, as the Board suggests, the work has in fact been eliminated, no other employees can be doing it. The longshoremen's agreement, then, cannot be "tactically calculated to satisfy union objectives elsewhere." *National Woodwork,* 386 U.S. at 644. Nothing can be more primary than an agreement to preserve "eliminated" work.

The only way such an agreement could become secondary would be if its application reached out to acquire other employees' work not previously performed by the contracting employees. *National Woodwork,* 386 U.S. at 630-31 and at 648 (Harlan, J. concurring). In this case, unlawful acquisition could occur only if the longshoremen's work had become inseparably integrated into the work of the off-pier employees—which the Board in this case found not to be the fact (Bd at 16, 24-27 (A. 163, 171-74); ALJ

at 31-37 (A. 44-50)).[11] The Board's decision did not find, nor does the Board's brief claim, that any off-pier work is being transferred to the docks by application of the Rules. *See* pp. 3-4 *supra*. The invocation of "elimination" does not supply the necessary secondary element.

The Board recognizes that acquisition is necessary. The bottom line of its decision is, "Therefore, we conclude that the Rules on Containers as applied to shortstopping and traditional warehousing practices have an illegal work acquisition objective." (Bd at 27 (A. 174)). However, in the light of its own factual findings, the Board cannot say that the work of off-pier employees is being acquired. Rather, it attempts to justify its decision by labelling as "acquisition" the attempt to retain "work that the technology, as the ILA agreed to have it operate, 'eliminated the need for.'" (NB at 49). This "eliminated" work is longshore work, not off-pier work. Unlawful acquisition occurs only when the work acquired is someone else's. Only then is it secondary. Acquiring one's own work is quintessentially primary. Indeed, it is not acquisition at all. It is work preservation.

The Board attempts to stigmatize this perfectly lawful conduct by expanding the term "acquisition" to include that which it has never meant in a manner that obliterates the distinction between primary and secondary. The Board appeals to this court to defer to the Board's discretion (NB at 51, 53). But judicial deference is neither absolute nor blind. *NLRB* v. *Brown*, 380 U.S. at 278, 292 (1965); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). It does not include sanctioning an Orwellian perversion of the plain meaning of the language which, if unchecked, would abolish the doctrine of work preservation.

---

[11] The opponents of the Rules have always recognized the need for integration to invalidate the Rules. They have always predicated their challenge on the contention, albeit fallacious, that longshore work has been inseparably integrated into the "new intermodal transportation system." *See, e.g.*, TGB at 17.

CONCLUSION

For the foregoing reasons and those set forth in the Shipping Group's Principal Brief, the Board's trucking and warehouse rulings should be reversed, the applications for enforcement in Nos. 83-1424 and 83-1486 denied, and the Rules on Containers declared lawful work preservation agreements in their entirety.

Dated: New York, New York
October 17, 1983

Respectfully submitted,

THOMAS W. GLEASON
ERNEST L. MATHEWS, JR.
90 Broad Street
New York, New York 10004
(212) 425-3240

Attorneys for International Longshoremen's Association, AFL-CIO

C. P. LAMBOS (*Lead Counsel*)
DONATO CARUSO
NICHOLAS G. MAGLARAS
LAMBOS, FLYNN, NYLAND & GIARDINO
29 Broadway (9th Floor)
New York, New York 10006
(212) 943-2470

Attorneys for New York Shipping Association, Inc.

FRANCIS A. SCANLAN
DEASEY, SCANLAN & BENDER, LTD.
2 Girard Plaza
Philadelphia, PA 19102
(215) 569-2333

Attorneys for Council of North Atlantic Shipping Associations

BRADEN VANDEVENTER
VANDEVENTER, BLACK, MEREDITH & MARTIN
2050 Virginia National Bank Bldg.
Norfolk, Virginia 23510
(804) 622-4381

Attorneys for New York Shipping Association, Inc. and Council of North Atlantic Shipping Associations

Nos. 84-677, 84-684, 84-691, 84-696, and 84-869

Office-Supreme Court, U.S.
FILED
JAN 3 1985
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1984

AMERICAN WAREHOUSEMEN'S ASSOCIATION, PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

INTERNATIONAL ASSOCIATION OF NVOCCs, ET AL., PETITIONERS
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

HOUFF TRANSFER, INC., PETITIONER
v.
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-677

AMERICAN WAREHOUSEMEN'S ASSOCIATION, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-684

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-691

INTERNATIONAL ASSOCIATION OF NVOCCs, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

No. 84-696

AMERICAN TRUCKING ASSOCIATIONS, INC., ET AL., PETITIONERS

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

No. 84-869

HOUFF TRANSFER, INC., PETITIONER

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

We have set forth the background of these cases in our petition in No. 84-861, *NLRB* v. *ILA*, which seeks review

of the same judgment of the court of appeals that is challenged by petitioners. These cases concern the Rules on Containers, which are part of collective bargaining agreements between the International Longshoremen's Association and shipping industry employers. The Rules are designed to deal with the effects of containerization on longshoremen's work. In *NLRB* v. *ILA (ILA I)*, 447 U.S. 490 (1980), this Court vacated two decisions of the National Labor Relations Board that had concluded that the Rules on Containers and their enforcement constitute secondary activity prohibited by Sections 8(b)(4) and 8(e) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4) and (e). On remand, the Board consolidated those two proceedings with seven other proceedings concerning the Rules on Containers. The Board concluded that the Rules violate the NLRA in their applications to a practice known as shortstopping and to certain traditional warehousing practices. The Board also concluded that the Rules are otherwise lawful. The court of appeals, disagreeing with the Board in part, held that the Rules are lawful in all respects. 734 F.2d 966; Pet. App. 40a-64a.[1]

In No. 84-861, we seek review of the court of appeals' decision insofar as it overturned the Board's ruling. Petitioners in Nos. 84-869 and 84-684 also seek review of this aspect of the court of appeals' decision. Petitioners in Nos. 84-677, 84-691, and 84-696 contend that the Rules violate the National Labor Relations Act in all their applications.

As we explain in our petition, the aspect of the court of appeals' decision that we challenge is inconsistent with the principles of this Court's decision in *ILA I*. See 84-861 Pet. 23-28. But as we also stated in our petition (84-861 Pet. 22,

---

[1] "Pet. App." refers to the appendix filed jointly by petitioners in Nos. 84-677, 84-684, 84-691, and 84-696.

28) — and as this Court noted in *ILA I* (447 U.S. at 493; see *id.* at 494-496) — the legality of the Rules in all their applications is a question of great practical significance. The Rules are in effect in every major Atlantic and Gulf port. The Rules determine the extent to which shippers can take advantage of the potentially enormous savings made possible by the growth of containerization, and their enforcement will significantly affect the operation of the land-sea transportation system, the cost of that transportation to shippers and consumers, and the jobs of many of those employed in the industry. Moreover, controversies over the treatment of containers have been a frequent cause of industrial strife in the shipping industry; a definitive resolution of the validity of the Rules will promote stability in the collective bargaining process in the shipping industry. Accordingly, it would be appropriate for the Court to consider the legality of the Rules in their entirety rather than considering only particular applications of the Rules.

It is therefore respectfully submitted that the petitions for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

JANUARY 1985

DOJ-1985-01